Re-Imagining Justice

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What do we mean by *legal* justice, as opposed to distributive, or social, or political justice; what is the justice, that is, we hope law promotes? What is the justice that lawyers and judges, peculiarly, are professionally committed to pursue? What is the virtue around which, arguably, this profession, and the individuals within it, have defined their public lives?

Justice—and more particularly *legal* justice—is a badly under-theorized topic in jurisprudence; perhaps surprisingly, there is little written on it.[1] The paucity of writing of course has a history. It can be traced to the turn of the last century—formative years of legal pedagogy and legal curriculum—when legal formalists and legal realists, who disagreed on virtually everything else regarding law, oddly enough agreed on the need to sever law from moral philosophy and more generally from high culture. Formalists, so as to render law autonomous, deductively pure, "scientific," and resting on its own bottom, so to speak, and realists, so as to tie law to the prestige, aspirations, and methods of the then nascent but ascending social sciences. Both realists and formalists, albeit for different reasons, sought to disassociate law from the demands of religion, morals, or culture, generally from the Toquevillian aristocratic norms within which law had been nested in the pre-Classical era. Justice, the great formalist Christopher Langdell thought, was not a fit subject of thought for a rigorous and professional and scientific law school curriculum.[2] Oliver Wendell Holmes, the father of legal realism, quite famously, was even harsher. "I hate justice," Holmes wrote. "I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."[3] At least in the legal academy, we have indeed taken the Holmesian admonition to heart. Fearful of appearing sentimental, childish, or, worst of all, ignorant of the law, twentieth century lawyers and legal scholars,

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1. The best short treatment is David Luban, *Legal Justice*, *in* ENCYCLOPEDIA OF JURISPRUDENCE AND LEGAL THEORY (1st ed., 2001).

2. *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6-12 (1983) (describing Langdell's vision of the law school curriculum).

3. Letter from Oliver Wendell Holmes to Dr. Wu, *in* OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED PAPERS 201 (H. Shriver ed., 1936).

with only a few exceptions,[4] have forsook the work of elucidating the concept of legal justice.

Holmes and Langdellian skepticism notwithstanding, one can quite easily discern a conventional, and largely uncriticized, turn-of-the-century understanding of legal justice, inside the academy and the profession. It finds oratorical expression in law day and graduation day speeches, in the major unspoken premises of countless conventional legal arguments, and in some, although again not much, jurisprudential scholarship. That conception—call it the dominant or conventional conception—I will argue below, is seriously flawed. More specifically, I want to suggest that it is seriously flawed in a way that directly and negatively affects feminist and progressive efforts at achieving political reform. Feminists and progressives need to take up the task of criticizing our conventional understanding of legal justice. More importantly, we need to take up the task of crafting alternatives.

Let me begin by specifying what I take the dominant conception to be. Legal justice—by which I mean here the virtue that specifically informs, constrains, or guides law, legal practice, and adjudication—consists of (at least) three separate commitments. First, the justice to which we conventionally aspire in law consists of a commitment to—and therefore an understanding of—the "Rule of Law." Lawyers take extraordinary pride in the Rule of Law, and routinely connect it, in law day speeches or graduation speeches, with the virtue of legal justice. The case may be different with other sorts of justice, but legal justice, we might, and often do say, is only possible within a pre-commitment to the Rule of Law. Put differently, the justice to which we are committed as lawyers is the justice produced by fidelity to law. So to understand the virtue of justice, we must understand the point of the Rule of Law.

Second, legal justice requires adherence to some recognizable regime of rights. Rights, to borrow from Ronald Dworkin's formulation, are the means by which justice is secured in law; they are the metaphorical bridge from the moral ought to the legal imperative.[5] Rights—justified by reference to our moral nature, and then consequentially constraining what the state may or may not do—are, no less than the rule of law, necessary to legal justice. It may not always or everywhere be so—other societies, for example, may organize their institutional commitment to justice around a scheme of duty, or a faith-based identity—but here and now, in this culture, we achieve justice through recognizing and then enforcing our rights. To understand legal justice requires an understanding of the rights to which we are entitled.

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4. Richard Posner's identification of legal justice with the maximization of wealth and Ronald Dworkin's identification of legal justice with integrity are the two prominent exceptions. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986); RICHARD POSNER, THE ECONOMICS OF JUSTICE (1981).

5. *See* RONALD DWORKIN, *Taking Rights Seriously*, *in* TAKING RIGHTS SERIOUSLY 184-205 (1977).

Third, and perhaps most obviously, according to the conventional conception, legal justice requires a commitment to some version of the rule of precedent—legal justice, for most lawyers, is the moral mandate to treat like cases alike, nothing more, but more importantly, nothing less. To do legal justice means, in essence, to decide cases according to rules. To decide cases according to rules in turn requires that likes be treated alike, and unlikes be rethought until their similarities with some pre-existing pattern are identified, and then likewise treated alike.[6] The virtue of legal justice requires a commitment to this moral mandate.

Each of these commitments—the Rule of Law, rights, and the Rule of Precedent—obviously requires interpretation. The dominant conception of legal justice consists not just of the ideals themselves, but also of particular understandings of the Rule of Law, of the nature of rights, and of precedent. My critical point, consequently, is this: the conventional understandings or interpretations of these three jurisprudential ideas—ideas about the nature of the Rule of Law, the nature of rights, and the nature of the Rule of Precedent—are not very good interpretations of those three ideals. But, as bad ideas go, they also have considerable power, particularly in law schools. These days, they blanket the legal academy. They have force, all the more so for being relatively unexamined.

Let me take them up in the order laid out above. First, the Rule of Law. What does it mean to live in a society governed by the Rule of Law? Why do those who live in one seemingly take such pride in it? It could of course mean many quite different things—and has meant many different things. The contemporary, now dominant, interpretation that I want to highlight is only one possible interpretation among many, but it is one that resonates broadly these days among law students, perhaps in part because it neatly echoes one presently popular version of this country's mythological history. On this view, the purpose of the Rule of Law is to shield both the individual and the community from the brunt of overly personal, tyrannical, whimsical, brutal, or "naked" politics. It is the Rule of Law that distinguishes legality from tyranny; the orderly and benign control of the social behavior of free men by rules from the whimsical, or worse, command over individuals by unchecked and unduly personal authority. Legalism—the very idea of law—shields us, in effect, from the excesses of unadorned political power. Law is power's antidote. Law is the antithesis of politics; law constrains, counters, and cabins politics. What we *ask* of law, on this accounting, what we turn to it to do, is to protect us from the ambitions of an overweening, zealous, at best unduly paternalistic and at worst sadistic, but always freedom-sapping, state. We organize authority in lawful forms so as to emasculate particular power holders or seekers; we establish law

6. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1037 (1990).

to frustrate the will to power.[7] By so doing, we free individuals to act, and to act in ways that are unpolluted by power. The underlying psychic parable of this understanding of law's essential appeal is Freudian: Brothers unite to overthrow the powerful and personal father and then establish in his place totemic, rather than personal, authority.[8] The fictional literature spawned in this century by the appeal of this vision—law as that which vanquishes power, and power, simply, as that which kills—is immense and known to all of us from young adulthood. Think, perhaps foremost, of the lawlessness of the political dictatorship of Oceania in George Orwell's dystopic classic *1984*.[9]

The prominence of this understanding of law's essence—that law and the Rule of Law is that which protects individual freedom from political overreach—unites and perhaps partly explains a good deal of contemporary constitutional law. It provides the unstated major premise of particular interpretations of quite general constitutional phrases. It is a view of law as the antithesis of power, for example, that has driven the Court over the last twenty years to interpret the Fourteenth Amendment's guarantee of "equal protection of the law" as severely constraining the political power of states from taking even modest affirmative steps toward eradicating the effects of racism, rather than as virtually requiring it to do so. A state acting in such an overtly political way, the Court has reasoned, is a far greater danger to individual freedom than the private racial stratification that a state so acting might thereby seek to ameliorate.[10] If the "Rule of Law," and hence "Constitutional Law," exists so as to limit, or mute, or muzzle politics, then surely the point of the Fourteenth Amendment is to limit, mute, and muzzle political voice. Similarly, and more specifically, it is this view of the Rule of Law, and its relation to public and private power, that underlies the view, now widely shared among right wing political and legal think tanks, the current Supreme Court, and I think most

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7. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

8. SIGMUND FREUD, TOTEM AND TABOO: RESEMBLANCES BETWEEN THE PSYCHIC LIVES OF SAVAGES AND NEUROTICS (A.A. Brill trans., Vintage Books 1918) (1918).

9. GEORGE ORWELL, 1984 (1949).

10. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490-92 (1989) (plurality opinion) (arguing that the city's affirmative action plan for minority-owned construction businesses failed constitutional strict scrutiny because the city did not demonstrate with enough specificity that the plan remedied past racial discrimination; thus, the government had no compelling interest in upholding it, and the plan itself was not sufficiently narrowly tailored). For critical commentary, *see* Erwin Chemerinsky, *The Supreme Court, 1988 Term–Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 54-56 (1989); Anthony E. Cook, *The Temptation and the Fall of Original Understanding*, 1990 DUKE L.J. 1163, 1194-96 (book review); Richard Delgado, *Playing Favorites*, 74 TEX. L. REV. 1223 (1996); Charles R. Lawrence, III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995); Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.*: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990); Laurence H. Tribe, *Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711 (1989); Patricia J. Williams, *Comment:* Metro Broadcasting, Inc. v. FCC*: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

ominously, the supposedly liberal editorial page of the *Washington Post*, that a substantial part of the Congressional "Violence Against Women Act" (VAWA), passed in 1994, is unconstitutional.[11] That Act, on this view, is itself a greater threat to freedom than is the actual, demonstrated unchecked violence against women that the law seeks to remedy. Thus, VAWA is precisely the sort of target at which the Constitution is aimed, and the act is accordingly unconstitutional. It is this reading of the Rule of Law, to take two final examples, that, at the turn of the last century, regarded the threat to freedom posed by minimum wage laws as a greater danger to individual freedom than the threat posed to individual survival by sub-minimum wages, and hence regarded those laws as unconstitutional. At the turn of this century, proponents of this same reading regard the greatest threat to free speech as emanating from innocuous campus and university speech codes, rather than from cross burnings, gay-bashing, or the vandalizing of menorahs on those same campuses, or for that matter the control of information by a handful of media elites, or the control of elections by economic elites. It is, in short, this understanding of law's essence that drives so many—including the current Supreme Court—to regard the idea of law itself, and hence the Constitution and the rights that law guarantees, as inexorably *limiting* rather than enabling, guiding or requiring congressional political action. It is this view of the point of the Rule of Law that posits a Constitution ever sensitive to the threat to freedom posed by an over-zealous state, and ever willfully blind to the threat to freedom, security, and community posed first by private fratricide, intimidation or subordination, and then by a quiet state and muzzled politics, that blithely acquiesces—or indeed gives aid—to private spheres of humiliation and fear. It is this view of the Rule of Law that makes this understanding of the Constitution seem natural, inevitable, and desirable, not just to the political right, but to a generation now of "apolitical" law students and lawyers.

It is also this view of the Rule of Law that constitutes at this point in our history a serious threat to progressive politics, and feminist politics in particular. The "politics" contemplated and paranoically feared by Rule of Law zealotry is demonized precisely because it is regarded, on this account, as thoroughly meaningless—necessarily, and essentially so. Politics is Dionysian, undisciplined, furious, and vengeful—in short, female; law, by contrast, is Apollonian, orderly, rule-like, rational, merciful, and male. The Rule of Law embodies the latter so as to constrain the former. A Rule of Law that fears politics, and that crafts a Constitution to disable politics does so because of the latter's essential, irredeemable irrationality: Politics, in this view, and the will to power to which politics gives voice, springs inexorably from a poisoned well

11. United States v. Morrison, 529 U.S. 598 (2000); *Editorial: States' Business*, WASH. POST, May 16, 2000, at A20. *But see* Peter M. Shane, *In Whose Best Interest? Not the States'*, WASH. POST, May 21, 2000, at B5 (criticizing both the decision and the *Post's* editorial).

of emboldened malignancy—think of the Furies, in Aeschylus's *Oresteia*, and remember their fate, once Apollo and Athena step in and impose the Rule of Law.[12] Power, hence politics, just is the utterly meaningless thirst to dominate. This impassioned, irrational, political urge, perhaps, cannot be vanquished, but its expression and force can be, and it is the role of *Law*—general, abstract, Apollonian, pure and apolitical—to do so. Rule of Law idolatry threatens the development of a feminist politics, because it poses politics itself as the threat with which law must reckon.

Second: On rights. Central to our now-dominant understanding of the virtue of legal justice is a particular conception of rights, or rather, a particular conception of the aspects of human nature protected, through rights, against unwise state encroachment. On this view, what we do and should protect, through rights, is the individual's heroic will: It is the individual's freedom to assert his will in whatever ways that he individually or idiosyncratically desires, unimpeded by noxious community and communitarian constraints, that is protected by rights. Thus, what is protected is my right to think, act, contract, express myself, own property, maintain privacy, amass wealth, and enjoy my possessions against malign, meddling, or irrational state infringement. The individual is protected, Constitutionally, against such infringements of his rights, and he is so protected because of a particular understanding of *who we are:* We are individuals whose essential being is best realized through unencumbered and counter-communitarian acts of individualistic will. It is that individual, the heroically willful individual, who is protected through a regime of rights.

This conception of rights, as scores of left-wing rights critics of the past thirty years have pointed out, is clearly hostile to efforts to address, through politics, private sphere subordination—whether that subordination occurs along race, gender or class lines.[13] It is this conception of rights, after all, that was expressed in the majority decision in *Dred Scott*,[14] protecting the rights of the slaveowner, no less than in *Lochner*,[15] protecting the rights of freely willing employers and employees, and likewise in a growing number of articles of the last five years, bemoaning the constitutional threat to the First Amendment posed by the protection of women against the hostile atmosphere created by verbal sexual harassment on the job.[16] More subtly however, although in my

12. AESCHYLUS, THE EUMENIDES 146 (Richmond Lattimore trans., University of Chicago 1953) (458 B.C.).

13. *See, e.g.*, Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

14. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

15. Lochner v. New York, 198 U.S. 45 (1905).

16. *See, e.g.*, Kingsley R. Browne, *An Evolutionary Perspective on Sexual Harassment: Seeking Roots in Biology Rather Than Ideology*, 8 J. CONTEMP. LEGAL ISSUES 5 (1997); Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579 (1995); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO

view just as important, this particular view of rights is hostile to efforts to use rights to protect aspects of our being that don't fit the heroically willful mold; thus, the problem posed for progressive and feminist politics by the right-wing understanding of rights, and the individual protected through them, is not just the occasional head-to-head conflict between individual rights so understood, and political antisubordinationist needs. The further damage is the neglect of other aspects of our natures which might be in need of rights.

To take an example: The dominant conception of rights stands as a serious obstacle to the nascent feminist efforts now underway by a number of feminist legal theorists, such as Martha Fineman,[17] some journalists, such as Deborah Stone,[18] some moral philosophers, including Eva Kittay,[19] and some liberal theorists, such as Linda McClain,[20] to construct meaningful and enforceable "rights of care," by which I mean rights that might aim to protect female or male caregivers against the vulnerabilities they sustain when engaged in caregiving labor in the private sphere. Rights of care, as envisioned by these thinkers, if we had them or if they were recognized, might protect caregivers against unwise state action, such as the Personal Responsibility and Work Opportunity Reconciliation Act,[21] or entitle caregivers to state support, such as through a more ambitious Family and Medical Leave Act.[22] Obviously, we don't presently have such rights, and even imagining such rights will no doubt prove to be arduous labor. One reason (among others) for the difficulty, is squarely ideological: The "rights of care" that are needed by caregivers are needed not so much to protect individualistic, heroic, independent acts of will. Rather, they are needed to protect vulnerabilities brought on by our relationality, our mutual dependency, and our interdependency. And they are justified, in turn, not by the liberation of industry, genius, invention, or artistry faciliated by the unencumbered individual heroic will, but rather, by the

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ST. L.J. 481 (1991); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 69 NOTRE DAME L. REV. 1003 (1993); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?* 86 GEO. L.J. 627 (1997); Eugene Volokh, *Debate: Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305 (1996); Eugene Volokh, *Comment: Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992). *See generally* Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701 (1995).

17. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

18. Deborah Stone, *Why We Need a Care Movement*, THE NATION, Mar. 13, 2000, at 13.

19. EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY (1998).

20. Linda McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673 (2001).

21. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C., 25 U.S.C., and 42 U.S.C.).

22. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., and 29 U.S.C.).

nurtured, healthful maturation and care that such labor ensures. But these hypothesized rights, perhaps needless to say, ill-fit our liberal understandings. We have rights, on the dominant view, to be free of obligation, of duty, and of dependency, and we have those rights because we are, essentially, creatures whose essence is best expressed not through relational acts of care that nurture and protect vulnerable others, but rather, through robust acts of independence, of defiance, and of individualistic trailblazing—acts that defy, not cement, our essential connections with others.

Third, our dominant understanding of legal justice is constituted by a particular understanding of the moral mandate, felt at some level by all actors in the judicial system, of horizontal equity: the imperative to "treat likes alike," or to follow precedent, or to comply with stare decisis. What is behind this mandate? The dominant conception has embraced two of the salient possibilities: first, we might insist on legal justice—on treating like cases alike—because we view such a mandate as an important bridge to the past: as a way of maintaining faith with ancestral wisdom, as a way of preserving traditions, as a way of forging a commonality between who we are as a community and who we have been as a community.[23] Second, we might insist on legal justice—on treating like cases alike—because such consistency and predictability is essential to the end of maximizing human liberty: By knowing with some certainty what and when the legal leviathan will impose itself upon me I can more freely order my own affairs, and the rule of precedent, or stare decisis, or the mandate to treat likes alike, furthers that certainty.[24] Thus, legal justice, as we presently understand it, serves the ends of traditionalism (or social conservatism) and libertarianism (or economic conservatism) quite nicely.

This understanding of formal, or horizontal, equity is also an obstacle to specifically feminist visions of politics and political reform. To combat subordination, there must be a breach, not relentless continuity, with our bonds to the past—at which time subordination was entrenched, and entrenched in the very traditions that legal justice and stare decisis so vigorously promote. And to either combat subordination or protect the work of caregiving, we must from time to time interfere with, rather than relentlessly honor, the liberty that comes from our certainty regarding the legal leviathan. A conception of legal justice that seeks to further either traditional patterns of social life or libertarian understandings of human well-being will not be well suited to the ends or means of progressive political visions. There will emerge, then, if these conceptions go unchallenged, a quite deep antithesis between the conservative idea of law, as reflected in understandings of formal justice, and the very idea of progressive political reform.

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23. Kronman, *supra* note 6.
24. *Id.* at 1037-39.

These ideas—ideas centering on the meaning of the Rule of Law, the content and purpose of our rights, and the moral mandate of horizontal equity—constitute the dominant conception of the virtue of legal justice. They, or something like them, dominate law day speeches and commencement addresses. But they are more than ornamental. They also undergird large chunks of constitutional argument—the Constitution is our highest Law, and the point of Law is to constrain and tame politics, and politics is what sovereigns produce—thus the point of the Constitution is to forbid certain outcomes by the political branches. The Constitution exists so as to frustrate rather than facilitate political solutions to social problems. They are also, all three of them, full of contradictions, enough contradictions to absorb the attention and energies of several generations of energetic deconstructionists. At the same time, however, they should not be undersold. They are, first, ideas. They are not simply preferences, stakes, or political parries. They have been a long time in the making; they have a lineage. They have an internal coherence, contradictions notwithstanding. They also, importantly, resonate with our mythological national history. They speak to the fears we have, rightly or wrongly, of over-bearing paternalism, communism, imperialism, states-run-amok, children or madmen or fundamentalist zealots or sadists at the helm of state. They also echo our dreams, and hopes, ill-placed or not, of unfettered liberty, of freedom being, happily, just another word for nothing left to lose, of breaking away, to borrow from the title of Lina Wertmuller's famous film, of our imagined essence being a function of the mark we each heroically and quite individually leave on our world.

To summarize: This ideological tripod—an interpretation of the Rule of Law, an understanding of Rights, and an explanation of the moral mandate of formal equality—constitutes a widely shared understanding of Legal Justice, which is both facially apolitical (these are ideas about law, after all, not about politics) but which also render natural, or neutral, legal conclusions that are inimical to a feminist or progressive politics. What to do about it? There are three options. One is to demonstrate the politics behind the claim of political neutrality. This has been the *idée fixe* of the critical legal studies movement now for over thirty years, and to make a long story short, not much has come of it. The second possibility is to point out the arguably central contradictions behind each leg of the tripod. A good bit of feminist and critical and left scholarship has gone into this project: The understanding of the Rule of Law recited above rests on a glaring and illogical leap of faith from the fact of a written word to the ghostlike dream of a government of laws rather than persons; the idea of a right as essentially a negative protection against state intervention into the private is belied by the existence of the criminal law itself, which positively protects us—although some more than others—against private maldistributions of physical power; and the mandate to treat likes alike is so

thoroughly riddled with exceptions, given the need to accommodate history and difference both, that it is problematized by virtually all serious doctrinal as well as theoretical legal scholarship of almost all stripes. There is, though, a third possible critical response, and that is to re-imagine.

We need a progressive jurisprudence—a jurisprudence that embraces rather than resists, and then re-interprets, our liberal commitment to the "rule of law," the content of our individual rights, and the dream of formal equality. More inclusive interpretations—more generous re-imaginings—could then undergird, and in a principled way, particular constitutional arguments. Rather than relentlessly buck, deconstruct, or vilify the seeming "naturalness" of legal arguments premised on moral premises, we ought to be providing such premises, and natural and general arguments of our own. But first we need to re-imagine.

Let me suggest some possible contrasts, starting with the Rule of Law. Contrast the understanding of the Rule of Law suggested above—in which the point of law is to frustrate, mute, muffle, politics—with a second and quite different understanding of both law's promise and the evil at which it is directed. On this alternative conception, the point or essence of law is to *construct*, rather than frustrate, the realm of politics. It is to nurture rather than stifle a public sphere within which our political natures find expression. The horror of lawlessness, on this view, finds dystopic expression not in the totalitarian imaginings of Orwell, but rather, in the equally parabolic young-adult masterpiece *Lord of the Flies*.[25] In Golding's dystopic vision, recall, it is the *absence* of a political state—not an all-too-powerful one—that gives rise to the domination of some and the subordination of others through fratricidal and infantile violence. The fear we counter with the hope of law, on this view, is not our fear of an overly powerful state, but rather, our fear of an impotent, absent, emasculated, or neglectful state, and the tribal, fraternal, or inter-familial warfare to which the absence of political authority would give rise. Put positively, the utopian alternative to fratricide that we attempt to construct through law, is not so much the unleashing of free individual choice unfettered by an oppressive state, but the necessary conditions of cooperative community life. Law, and the point of the Rule of Law, on this view, is not to frustrate politics, but to enable it. And politics, on this view, is not the dictatorial or totalitarian Orwellian nightmare, or the lethal war of all against all, but rather the antithesis of both; it is the means by which communities and individuals create meaning.

If that is the point of law, then it is also in some way the point of the Fourteenth Amendment's Equal Protection Clause to guarantee not only equality, but also equal protection of the law. If that's right, then the Rule of Law so understood points unequivocally toward the constitutionality, indeed

25. WILLIAM GOLDING, LORD OF THE FLIES (1954).

the constitutional necessity, of the Violence Against Women Act, as well as the Brady Bill, as well as other forms of gun legislation. If the point of law is to police against private violence, as Thomas Hobbes urged some time ago,[26] then the Constitution, and surely the Fourteenth Amendment's Equal Protection Clause, must exist in part to ensure that this protection against violence is granted equally. If that is right, then the constitutionality of VAWA, I think, follows inexorably. And—it is right. It is the basic point of law, and hence of the Rule of Law, to police against private violence. Hobbes had that exactly right. And it is most assuredly the point of the Fourteenth Amendment's equal protection clause, to ensure that protection is granted equally.

Likewise, rather than abandoning rights—throwing the baby out with the bathwater—we need to rethink, jurisprudentially, the understanding of who we are and what we are that underlies the dominant understandings of rights. We are not only beings whose essence is realized through heroic acts of independent will. We are also parents and grandparents and children of parents and grandparents whose essence is realized through acts of care that protect those dependent upon us and give meanings to our lives by virtue of so doing. Those caring acts that emanate from us and that are bestowed upon us are not only necessary for our individual and collective survival, but they are also the soil in which our moral and most human selves are rooted. They are also, developmentally, essential conditions for the flowering of the individualist spirit so celebrated by both liberal and right wing jurists, and fitfully protected by liberal rights. Perhaps we do, as liberal and libertarian philosophers and jurists of the last five hundred years have urged, need rights to protect our individuality—to protect our freedoms of thought, speech, religion, property, and contract. No less vitally, however, we need rights that we currently lack: We need rights that protect our ability and will to care for the weak among us, and to nurture them to health, and to care for the young, and bring them to responsible maturity, and to comfort and care for the elderly and ease the burdens of age. We need such rights of care not only, and not even primarily, to protect those activities against an overweening state. We need those rights to valorize and honor this fundamental aspect of our being. We need such rights so as to goad to action—not inaction—community and state support for those essential and essentially interdependent spheres of social life.

And finally, we need to re-imagine the point of the mandate of legal justice. The "moral point" of the mandate to treat likes alike, much authority to the contrary notwithstanding, may be, at heart, neither to protect tradition nor liberty. The point of treating likes alike may rather be rooted in a universalist and humanistic inclination to define the human community broadly—to envision a community that includes all, and includes all because of a recognition of shared humanity. This cosmopolitan vision of the mandate of

26. THOMAS HOBBES, THE LEVIATHAN 120-21, 153-54 (Richard Tuck ed., 1996) (1651).

legal justice as well, of course, has difficulties, both conceptual and moral, but it is nevertheless one which would not be at heart hostile to feminist and progressive aspirations. It would strive for and stress both inclusiveness and respect for difference. It would seek a large rather than constrained community; its impulse is toward a global as well as local acknowledgement of duty and responsibility. If accepted, it would align law, the idea of law, and the idea of legal justice, not with the traditions of the best or the economic liberty of individual and corporations, but rather, with the hopes for a community of world citizens. It would align law, legal justice, lawyers, and lawyering professionally, with a recognition that the universal human rights of women, as of all, are grounded in a shared humanity and ultimately a shared fate. It would align the idea of law and the ideals of law with the feminist politics of the greatest moment, the struggle to secure basic rights for those women both here and abroad who lack them, because they are regarded as both different from and less than some shared human essence. [27]

To summarize, in my view, our dominant conception of the virtue of legal justice has at its core a set of ideas: particular interpretive understandings of the point of the Rule of Law, the nature of rights, and the meaning of precedent. They are not very good ideas. They are full of contradictions and they are ungenerous in the extreme. But we ignore them at our peril. Ideas do matter, to repeat a cliché, and bad ideas will win out, if there is no counter. There presently isn't much of one. We need and don't have a progressive jurisprudence—a conception of the point of the Rule of Law, of Rights, and of formal or legal justice—that is respectful of the needs, ambitions, aspirations and—yes—the natures of heretofore not terribly well-respected women, children, animals and men. We don't have such a conception, and we don't have it, in part, because we have grown distrustful of the project: distrustful of the ideals of the Rule of Law, of the punishing and anti-womanist hidden implications in the idea of rights, of the not so well-hidden dangers in a backward looking and backward regarding understanding of legal justice. But we have lived without a conception of justice for long enough now to see the damage that skepticism has wrought. We need to not only deconstruct so as to expose the hidden politics of dominant conceptions of justice; we need to construct or re-imagine alternatives with care.

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27. I argue this at greater length in Robin West, *Is the Rule of Law Cosmopolitan?*, 19 QUINNIPIAC L. REV. 259 (2000).